MOTION FILED
NOV 17 1997

No. 97-679

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

AT&T CORP.,
Petitioner,
v.
CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE UNITED STATES TELEPHONE ASSOCIATION, SOUTHWESTERN BELL TELEPHONE COMPANY AND PACIFIC BELL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

MARY MCDERMOTT
LINDA KENT
KEITH TOWNSEND
HANCE HANEY
UNITED STATES TELEPHONE ASSOCIATION
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7300

GARY M. EPSTEIN
MAUREEN E. MAHONEY *
TERESA D. BAER
ALYSSA R. HARVEY
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200
Counsel for amici curiae United States Telephone Association, Southwestern Bell Telephone Company and Pacific Bell

[Additional Counsel Listed on Inside Cover]

November 17, 1997

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

DURWARD D. DUPRE
MICHAEL J. ZPEVAK
THOMAS A. PAJDA
SOUTHWESTERN BELL
TELEPHONE COMPANY
One Bell Center, Room 3518
St. Louis, MO 63101
(314) 235-2507

BART KIMBALL
PACIFIC BELL
1010 Wilshire Boulevard
Room 1501
Los Angeles, CA 90017
(213) 975-3117

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-679

AT&T CORP.,
Petitioner,
v.
CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Pursuant to Rule 37.2 of the Supreme Court Rules, United States Telephone Association ("USTA"), Southwestern Bell Telephone Company ("Southwestern Bell") and Pacific Bell respectfully move this Court for leave to file the accompanying brief of *amici curiae* in support of petitioner. Petitioner's counsel has authorized movants' counsel to represent that petitioner consents to the filing of this brief. Movants' counsel attempted to contact respondent's counsel, Bruce M. Hall, Esq., to request consent to the filing of this brief, but received no response. USTA, Southwestern Bell and Pacific Bell therefore are filing this motion.

USTA is the leading trade association for the local telephone industry in the United States. Founded a century ago, USTA represents over 1,000 small, mid-size and

large local exchange carriers ("LECs")—providers of local[1] telephone service—that operate more than 95 percent of the nation's total number of local access lines, including access lines in each state in the Ninth Circuit.[1] Southwestern Bell is a regional Bell Operating Company that provides local telephone service in Missouri, Kansas, Arkansas, Oklahoma and Texas. Pacific Bell is a regional Bell Operating Company that provides local telephone service in California. Both Southwestern Bell and Pacific Bell are members of USTA. USTA, Southwestern Bell and Pacific Bell frequently file *amici curiae* briefs in the federal courts of appeals and the United States Supreme Court on issues of vital concern to the local telephone industry, and USTA and Pacific Bell thus participated as *amici curiae* in the proceedings before the Ninth Circuit.

The Ninth Circuit majority's decision declining to apply the "filed tariff," or "filed rate," doctrine to respondent's claims is of great concern to USTA's members, including Southwestern Bell and Pacific Bell, since that doctrine applies not just to long distance carriers such as petitioner, but also to LECs. Like long distance carriers, LECs are statutorily required to provide services pursuant to tariffs on file with federal and state regulatory agencies. Allowing the lower court's decision to stand will seriously disrupt the provision of local telecommunications services and subject millions of local telephone customers in the Ninth Circuit to discriminatory pricing. USTA, Southwestern Bell and Pacific Bell have important interests in (i) ensuring the stability of the regulatory regime that has served carriers and customers well for many decades; (ii) preventing customers from asserting entitlements to rates or services that vary from the rates or services specified in a carrier's published tariffs; and (iii) promoting the key federal and state statutory requirements of uniform service and nondiscriminatory pricing. Thus, movants bring a broader perspective to the issues in this case than that presented by the parties themselves.

For the foregoing reasons, movants USTA, Southwestern Bell and Pacific Bell respectfully request that they be allowed to participate in this case and file the accompanying *amici curiae* brief in support of petitioner.

Respectfully submitted,

MARY MCDERMOTT
LINDA KENT
KEITH TOWNSEND
HANCE HANEY
UNITED STATES TELEPHONE ASSOCIATION
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7300

DURWARD D. DUPRE
MICHAEL J. ZPEVAK
THOMAS A. PAJDA
SOUTHWESTERN BELL TELEPHONE COMPANY
One Bell Center, Room 3518
St. Louis, MO 63101
(314) 235-2507

BART KIMBALL
PACIFIC BELL
1010 Wilshire Boulevard
Room 1501
Los Angeles, CA 90017
(213) 975-3117

GARY M. EPSTEIN
MAUREEN E. MAHONEY *
TERESA D. BAER
ALYSSA R. HARVEY
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200
Counsel for amici curiae United States Telephone Association, Southwestern Bell Telephone Company and Pacific Bell

November 17, 1997

* Counsel of Record

[1] Since petitioner is a provider of long distance services, it is not a member of USTA.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF THE *AMICI CURIAE*	1
REASONS FOR GRANTING THE PETITION	1
CONCLUSION	8

TABLE OF AUTHORITIES

FEDERAL CASES	Page
Arkansas Louisiana Gas Co. v. Hall, 453 U.S. 571 (1981)	3
Armour Packing Co. v. United States, 209 U.S. 56 (1908)	5
Birnbaum v. Sprint Comms. Co., L.P., 1996 U.S. Dist. LEXIS 17389, Civ. No. 96-2514 (E.D.N.Y. Nov. 19, 1996)	6
H.J., Inc. v. Northwestern Bell Tel. Co., 954 F.2d 485 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992)	6
International Tel. Ctr. v. AT&T, 1997 U.S. Dist. LEXIS 14186, Civ. No. 96-3398 (E.D. La. Sept. 15, 1997)	6
Keogh v. Chicago & N.R. Co., 260 U.S. 156 (1922)	3, 4
Kutner v. Sprint Comms., L.P., 1997 U.S. Dist. LEXIS 16390, Civ No. 96-2534 (W.D. Tenn. Mar. 21, 1997)	6
Louisville & Nashville R.R. v. Maxwell, 237 U.S. 94 (1915)	3
MCI Telecomms. Corp. v. Happy the Glass Man, Inc., 974 F. Supp. 1016 (E.D. Ky. 1997)	6
MCI Telecomms. Corp. v. AT&T, 512 U.S. 218 (1994)	2
Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990)	3, 4, 5
Marcus v. AT&T, 938 F. Supp. 1158 (S.D.N.Y. 1996)	6
Multi Comm. Media, Inc. v. AT&T, 1997 U.S. Dist. LEXIS 5166, Civ. No. 96-2679 (S.D.N.Y. Apr. 17, 1997)	6
Policy and Rules Concerning the Interstate Interexchange Marketplace, (CC Docket No. 96-61), *Second Report and Order*, 11 FCC Rcd 20730 (1996), *stayed on appeal, MCI Telecomms. Corp. v. FCC*, No. 96-1459 (D.C. Cir., Feb. 13, 1997), *recon.*, FCC No. 97-293 (Aug. 21, 1997)	3
Roth v. AT&T, 1997 U.S. Dist. LEXIS 2518, Civ. No. 96-7129 (C.D. Cal. Jan. 28, 1997)	6
Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17 (2d. Cir. 1994)	6

TABLE OF AUTHORITIES—Continued

STATE CASES	Page
Porr v. NYNEX Corp., 660 N.Y.S.2d 440 (N.Y. App. Div. 1997)	6
Southwestern Bell. Tel. Co. v. Metro-Link Telecom, Inc., 919 S.W.2d 687 (Tex. App. 1996)	6
Teleconnect Co. v. U.S. West Comms., Inc., 508 N.W.2d 644 (Iowa 1993)	7

FEDERAL STATUTES AND RULES	
47 U.S.C. § 10	2
§ 201	4
§ 202	4
§ 203	4
§ 203(a)	2
Sup. Ct. R. 37.6 (1997)	1

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

No. 97-679

AT&T CORP.,
Petitioner,
v.
CENTRAL OFFICE TELEPHONE, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

---

BRIEF *AMICI CURIAE* OF THE UNITED STATES TELEPHONE ASSOCIATION, SOUTHWESTERN BELL TELEPHONE COMPANY AND PACIFIC BELL IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICI CURIAE*

The interest of the *amici curiae* is set forth in the motion accompanying this brief.[1]

REASONS FOR GRANTING THE PETITION

The Ninth Circuit's evisceration of the filed rate doctrine raises issues of national importance that warrant

---

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party has authored this brief in whole or in part, and that no person or entity, other than the *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

prompt review and summary reversal by this Court. For the reasons set forth in the petition, summary reversal is warranted in light of the Ninth Circuit's refusal to follow settled precedent of this court. If the decision is permitted to stand, it will destabilize long-settled relationships between hundreds—if not thousands—of telecommunications common carriers and millions of customers, sharply increase the costs of providing not only long distance but also local telecommunications services to U.S. consumers, and undermine fundamental regulatory goals and statutory requirements of uniform and fair treatment of consumers. The far-reaching and disruptive consequences of the Ninth Circuit's decision will harm carriers and consumers not just in the Ninth Circuit, but across the country.

For nearly 100 years, filed tariffs have been the cornerstone of the relationship between a regulated common carrier and its customers. Section 203(a) of the Communications Act of 1934 provides that "every common carrier . . . shall . . . file with the Commission and print and keep open for public inspection schedules showing all charges . . . and showing the classifications, practices, and regulations affecting such charges."[2] States have similar tariff-filing requirements. As this Court observed only three years ago, "[t]he tariff-filing requirement is . . . the heart of the common-carrier section of the Communications Act," since "rate filing was Congress's chosen means of preventing unreasonableness and discrimination in charges."[3] While the Telecommunications Act of 1996 gave the Federal Communications Commission ("FCC" or "Commission") the authority to forbear from requiring the filing of tariffs where the Commission determines that detariffing will promote competition,[4] and the FCC has considered exercising its authority to forbear from requiring the filing of tariffs for the provision of domestic long

[2] 47 U.S.C. § 203(a).

[3] *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 230 (1994) (citing cases).

[4] *See* 47 U.S.C. § 10.

distance services,[5] local telephone companies are not the subject of any pending detariffing action. Thus, *every single incumbent LEC in the country*—more than 1,300 carriers in all—remain fully subject to the statutory tariff-filing requirement at both the federal and local levels.

The filed rate doctrine has long made clear that carriers, such as the members of United States Telephone Association ("USTA"), including Southwestern Bell Telephone Company ("Southwestern Bell") and Pacific Bell, are absolutely forbidden to charge rates for their services other than those specified in the tariffs they have on file with the FCC or state public utility commissions, or to vary the terms of service in any way from the terms specified in their tariffs.[6] LECs and other common carriers thus file detailed tariffs specifying their rates and terms of service—rates and terms of service that apply in all states that a carrier serves in the case of FCC-filed tariffs and statewide in the case of tariffs on file with state public utility commissions—and the carriers are bound to adhere to those tariffs unless a regulatory agency finds them unreasonable. This bright-line rule has ensured the existence of reasonable and nondiscriminatory rates and services, avoided situations of unequal bargaining power between carriers and consumers, minimized unnecessary confusion on the part of both carriers and consumers, and given clear guidance to the carriers themselves as to the applicable statutory and regulatory requirements governing their operations. By declining to apply the filed rate doctrine to preempt the respondent's state law claims

[5] *See Policy and Rules Concerning the Interstate Interexchange Marketplace*, (CC Docket No. 96-61), *Second Report and Order*, 11 FCC Rcd 20730 (1996), *stayed on appeal, MCI Telecomms. Corp. v. FCC*, No. 96-1459 (D.C. Cir., Feb. 13, 1997), *recon.*, FCC No. 97-293 (Aug. 21, 1997).

[6] *See Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 126 (1990); *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 577 (1981); *Keogh v. Chicago & N.R. Co.*, 260 U.S. 156, 163 (1922); *Louisville & Nashville R.R. v. Maxwell*, 237 U.S. 94, 97 (1915).

based on alleged extra-tariff agreements relating to service provisioning, the Ninth Circuit has eviscerated the filed rate doctrine and thereby undermined the foundation on which federal and state common carrier regulation is based.

First and foremost, the Ninth Circuit's decision destroys the uniformity of rates and services that is the "paramount purpose" of the filed rate doctrine and the tariff-filing system itself.[7] Under the Ninth Circuit's decision, telecommunications carriers will remain obligated to file tariffs, charge and collect only the filed rate for the services they provide, and apply their tariffs universally without any discrimination whatsoever.[8] But USTA's members, including Southwestern Bell and Pacific Bell, and other carriers no longer will be entitled to rely on filed tariffs as the definitive statement of their rights, duties and liabilities with respect to the telecommunications services they provide to customers, and they will have no way to guarantee uniform service to all customers. To the contrary, any customer will be able to claim the existence of a "side deal" and obtain the non-uniform treatment that Congress clearly intended to prevent. Indeed, any inadvertent remark by a careless sales representative, or any description of a service published in a carrier's marketing materials, could provide a basis for a customer to manufacture a claim for special treatment.

Second, to the extent that individual customers succeed in enforcing agreements for extra-tariffed services, carriers no longer will be able to guarantee the provision of uniform, nondiscriminatory services to similarly situated customers, contrary to Congress' unambiguous mandate. Customers with varying degrees of bargaining power will obtain different rates and terms of service than the rates and terms of service available under a carrier's filed tariff.

[7] *See Maislin*, 497 U.S. at 126 (citing *Keogh*, 260 U.S. at 163).

[8] *See* 47 U.S.C. §§ 201-203.

Smaller customers thus effectively will subsidize those with greater resources who are able to obtain preferential treatment. As a result, customers who previously could rely on the certainty and predictability of receiving the rate and terms of service specified in tariffs filed with federal or state regulators no longer will have any assurance of the rate to which they are entitled for a particular service, much less the rate paid by, and the services provided to, their competitors.

Third, the new "freedom" to deviate from the terms of a tariff may well invite the very kind of discriminatory practices and preferences that Congress intended to prohibit.[9] As the dissent below correctly reasoned, if carriers were "bound only to those rates and not the corresponding services" set forth in their tariffs, as the Ninth Circuit majority held, "carriers could easily devise schemes to avoid the Communications Act's fairness requirements,"[10] improperly favoring some customers over others. Under the Ninth Circuit majority's view, nothing would prevent an unscrupulous carrier from intentionally granting a competitive advantage to a preferred customer by conferring expedited or enhanced services on that customer alone, thereby discriminating against other customers who pay the same filed rate. LECs properly abiding by the requirements of their tariffs and unwilling to offer selected customers similarly special deals will be at a serious competitive disadvantage.

Fourth, this untenable situation inevitably will engender a procession of lawsuits by customers seeking to circumvent the terms of tariffs on file before federal and state regulators or to obtain the same special deal accorded

[9] *See Maislin*, 497 U.S. at 127-28; *Armour Packing Co. v. United States*, 209 U.S. 56, 81 (1908) (elimination of the filing requirement "opens the door to the possibility of the very abuses of unequal rates which it was the design of the statute to prohibit and punish").

[10] App. 21a.

to their competitors. Under the Ninth Circuit's decision, any customer—at least within the Ninth Circuit—will be entitled to bring suit under a variety of state law contract and tort theories to enforce alleged agreements for extra-tariff rates or services, or to abrogate or expand services already provided pursuant to tariff. As a result, courts now will be forced to resolve disputes over even the most mundane tariff details.[11] Indeed, this case—involving the specific question whether petitioner's personnel had orally or impliedly promised the respondent quicker service and different billing options than expressly provided for under petitioner's federally filed tariff—is just one example of the many lawsuits that already have been, and will continue to be, filed in courts across the country unless this Court promptly and summarily reverses the Ninth Circuit's erroneous decision. Until now, such lawsuits routinely had been dismissed under the filed rate doctrine.[12]

---

[11] *See, e.g., MCI Telecomms. Corp. v. Happy the Glass Man, Inc.*, 974 F. Supp. 1016 (E.D. Ky. 1997) (dismissing a complaint claiming that a billing dispute should not proceed to arbitration, even though the tariff provided for arbitration of such disputes); *Marcus v. AT&T*, 938 F. Supp. 1158, 1163-64 (S.D.N.Y. 1996) (dismissing a complaint claiming that the carrier did not separately notify subscribers that, in billing, the carrier rounded up to the next higher full minute, even though the tariff provided for such rounding); *Porr v. NYNEX Corp.*, 660 N.Y.S.2d 440 (N.Y. App. Div. 1997) (same).

[12] *See, e.g., Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994); *H.J., Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 488-94 (8th Cir.), *cert. denied*, 504 U.S. 957 (1992); *International Tel. Ctr. v. AT&T*, 1997 U.S. Dist. LEXIS 14186, Civ. No. 96-3398 (E.D. La. Sept. 15, 1997); *Multi Comm. Media, Inc. v. AT&T*, 1997 U.S. Dist. LEXIS 5166, Civ. No. 96-2679 (S.D.N.Y. Apr. 17, 1997); *Kutner v. Sprint Comms., L.P.*, 1997 U.S. Dist. LEXIS 16390, Civ. No. 96-2534 (W.D. Tenn. Mar. 21, 1997); *Roth v. AT&T*, 1997 U.S. Dist. LEXIS 2518, Civ. No. 96-7129 (C.D. Cal. Jan. 28, 1997); *Birnbaum v. Sprint Comms. Co.*, L.P., 1996 U.S. Dist. LEXIS 17389, Civ. No. 96-2514 (E.D.N.Y. Nov. 19, 1996); *Porr, supra*, 660 N.Y.S.2d 440 (N.Y. App. Div. 1997); *Southwestern Bell Tel. Co. v. Metro-Link Telecom, Inc.*, 919 S.W.2d 687, 694-97 (Tex. App. 1996); *Teleconnect Co. v. U.S. West Comms., Inc.*, 508 N.W.2d 644, 650 (Iowa 1993).

Such lawsuits pose unwarranted burdens on carriers and consumers. The unpredictability of tariff enforcement will be particularly problematic for the many LECs whose service areas are not confined to one particular state within the Ninth Circuit, but extend to many different states and even many Circuits. Moreover, aside from the enormous litigation expenses that those and other carriers will incur in defending against lawsuits alleging the existence of special deals, carriers potentially will face added costs for providing extra-tariffed services or paying damages for failure to provide those services to a successful plaintiff. Ultimately, LECs will have no choice but to pass those costs on to consumers in the form of higher rates for local telephone service.

In short, permitting the Ninth Circuit majority's decision to stand will have far-reaching and disruptive consequences that will harm consumers and LECs in the Ninth Circuit and across the country.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari and summarily reverse the decision of the Ninth Circuit.

Respectfully submitted,

MARY MCDERMOTT
LINDA KENT
KEITH TOWNSEND
HANCE HANEY
UNITED STATES TELEPHONE ASSOCIATION
1401 H Street, N.W.
Suite 600
Washington, D.C. 20005
(202) 326-7300

DURWARD D. DUPRE
MICHAEL J. ZPEVAK
THOMAS A. PAJDA
SOUTHWESTERN BELL TELEPHONE COMPANY
One Bell Center, Room 3518
St. Louis, MO 63101
(314) 235-2507

BART KIMBALL
PACIFIC BELL
1010 Wilshire Boulevard
Room 1501
Los Angeles, CA 90017
(213) 975-3117

GARY M. EPSTEIN
MAUREEN E. MAHONEY *
TERESA D. BAER
ALYSSA R. HARVEY
LATHAM & WATKINS
1001 Pennsylvania Avenue, N.W.
Suite 1300
Washington, D.C. 20004
(202) 637-2200
Counsel for amici curiae United States Telephone Association, Southwestern Bell Telephone Company and Pacific Bell

November 17, 1997

* Counsel of Record